

FCC MAIL SECTION

Before the

FEDERAL COMMUNICATIONS COMMISSION

Washington, D.C. 20554

ORIGINAL  
FCC MAIL SECTION

FCC 97M-44

70986

APR 1 9 14 AM '97

In Matter of ) WT DOCKET NO. 94-147  
)  
JAMES A. KAY, JR. )  
)  
Licensee of one hundred fifty two )  
Part 90 licenses in the )  
Los Angeles, California area. )

O R D E R

Issued: March 25, 1997 ; Released: March 27, 1997

A Prehearing Conference was held on March 19, 1997. Deposition discovery in this proceeding can resume immediately and be completed in sufficient time to prepare for hearing. The procedural and hearing dates that are set below are substantially those submitted by Bureau counsel.<sup>1</sup>

Additional Discovery

The Bureau intends to call fewer than 12 non-party witnesses to testify in its case in chief. The Bureau also reported and Kay's counsel essentially confirmed, that some of those persons may have been deposed by Kay in one or more state court actions that are pending in California. It is not known at this time how much of the information sought in those state depositions relate to issues in this proceeding. There was no indication that the depositions were placed under seal. Those depositions may be a useful source to both parties in their hearing preparations. Kay's counsel stated that he will cooperate in obtaining copies of the depositions for Bureau counsel.

The Bureau is allowed to submit five interrogatory questions to Kay for the purpose of receiving updated information and to obtain the identity and location of depositions taken by Kay of potential Bureau witnesses in civil litigation. The interrogatories must be served by April 4, 1997.

Kay shall commence deposition discovery of the potential witnesses identified by the Bureau and shall coordinate the dates of the depositions

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<sup>1</sup> The Bureau had suggested that the hearing commence on September 22, 1997. It may take more than 5 business days to complete the testimony in Los Angeles. It will be necessary to have that phase completed and related travel concluded by the close of the fiscal year. In the interest of efficiency, the testimony of Kay and any experts should be heard in Washington, D.C.

with Bureau counsel. Notices To Depose are to be issued on or before April 4, 1997.<sup>2</sup>

On April 4, 1997, Kay and the Bureau shall specify any additional documentary discovery that is claimed to be needed (except for the loading data and the government documents which are the subject of a FOIA lawsuit).

An inspection of Kay's stations will be commenced by the Bureau as soon as possible. Such inspections shall be concluded no later than April 30, 1997.

#### Hearing Preparation

The Presiding Judge has considered and rejected certain of the procedures that were suggested by the parties in their respective Status Reports and at the Prehearing Conference.

#### Bureau

A further motion to compel production of Kay's loading information would be repetitive and probably would not lead to useful discovery. That conclusion is based on Kay's representations that he has produced all of his business documents relating to loading (end-users and customers). Kay has not undertaken to obtain such information from current and former user-customers.<sup>3</sup> The ultimate information sought pertains to loading, an ultimate fact issue to be litigated. The Bureau will have the opportunity to depose and cross-examine Kay on complete and truthful compliance with Bureau discovery of loading data. Candor of a party licensee is constantly in issue while the hearing record is open and evidence is being presented. Maria M. Ochoa, 8 FCC Rcd. 3135 (1993).

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<sup>2</sup> An agreed deposition schedule is to be submitted in writing by April 2, 1997. See Prehearing Conference Order FCC 97M-32 at 2. Counsel for Kay represented that at least one expert witness will testify on industry business practices (e.g. loading records). The Bureau expects also to have an expert testify. The status of experts will be reported by April 9, 1997. Id. Bureau counsel has identified witnesses by reference to attachments to its Answers to Kay's interrogatories dated March 8, 1995. The Bureau must list the presently known individual names and addresses in an appropriate part of its submission of April 2, 1997. See Prehearing Conference Order, FCC 97M-32 at 2 (Depositions).

<sup>3</sup> At the Prehearing Conference of March 19, 1997, Kay's counsel represented that Kay will not seek to contact former and current users to obtain the information on loading. The Bureau contends such information is essential to its case in chief. Facts and circumstances of Kay's compliance with discovery can be the subject of his testimony. There may be adverse inferences sought by the Bureau for Kay's failure to obey an order. See Order FCC 95M-203, released October 31, 1995.

Kay

Discovery was formally suspended over 14 months ago as a result of the shutdown of the government due to a budget impasse. See Order FCC 96M-1, released January 18, 1996.<sup>4</sup> It was necessary that Deposition Notices be cancelled. Now, on remand, Kay can **immediately again serve** the Deposition Notices on the 14 persons whom he had earlier noticed for depositions.<sup>5</sup>

Kay states a need to depose as many as 30 persons in California and Kay intends to depose each witness that the Bureau sponsors for hearing testimony, some or all of whom may be included in the 30. The Bureau contends that Kay already knows the pool of the Bureau's potential witnesses.<sup>6</sup> Kay states that it will take four to five months to complete the depositions. It cannot be determined now whether Kay will be permitted to take that many depositions.

Kay represents that Bureau documents which are being sought through FOIA are essential. But without a clear showing of cause, there will be no delays of the hearing in order to await a court resolution of Kay's FOIA demands.

Kay makes the following conclusary arguments for a hearing in December 1997:

- Four to five months needed to complete discovery.
- Thirty days needed for the Bureau and 60 days needed for Kay to exchange cases.
- Kay requests discovery even after the exchange of cases.
- Kay requests an additional 30 days after the exchange of cases to prepare a trial brief that is required by the Presiding Judge.

But Kay has not made a convincing showing that his proposed December schedule is the earliest possible hearing schedule. The September schedule adopted below does not appear to be unreasonable. The Bureau has the burdens of

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<sup>4</sup> There had also been a four month hiatus in 1995, requested by both parties to permit settlement negotiations toward a consent order.

<sup>5</sup>The following depositions were noticed for January and February 1996: Dr. Michael Steppe, Mr. Ed Cooper, Mr. John Musico, Mr. Frank Barnett, Mr. Christopher Killian, Mr. Kevin Hessman, Mr. Roy Jensen, Mr. Michael Grimm, Mr. Robert Brown, Mr. Jim Doering, Mr. Richard Lewis, Mr. Richard Rose, Mr. Harold Pick, and Mr. David L. Cardin. All depositions were to be taken in Encino, California. Counsel for Kay indicated that some of these deponents would oppose the depositions. That is all the more reason why counsel should serve the notices forthwith.

<sup>6</sup> Kay is entitled to the identity of the **persons** who will be testifying in the Bureau's case and not just the names of companies. But Kay now has the names and identities of 14 persons who were previously noticed for depositions.

proceeding and proof and the Bureau represents that it can meet those dates. Kay should be ready to proceed with his defense immediately after the Bureau puts on its case.<sup>7</sup>

#### Procedural and Hearing Dates

The schedule for procedural and hearing dates is set as follows:

##### 1997

- July 25 - Conclude Discovery.
- August 8 - Bureau Exchanges Exhibits, Sworn Written Testimony or Witness Summaries, and Trial Brief.<sup>8</sup>
- August 22 - Kay Exchanges Exhibits, Sworn Testimony or Witness Summaries, and Trial Brief.
- August 25 - Submit Trial Subpoenas to Presiding Judge.
- August 26 - Notification by 12 noon of Witnesses for Cross-Examination (by fax/telephone/confirm in writing).
- August 28 - Oppositions to Cross-Examination by 12 noon (by fax/telephone/confirm in writing).
- September 9 - Admissions Session in Washington, D.C.
- September 10-12 - Courtroom reserved for testimony in Washington, D.C.
- September 16-25 - Hearing facilities to be reserved in Los Angeles or Vicinity.

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<sup>7</sup> Kay may be called to testify twice: first, as an adverse witness for the Bureau in its case in chief, and second, as a witness for the defense. Kay had earlier not objected to testifying in Washington, D.C. See Tr. of conference of January 27, 1995, at pp. 41-43 and related Order FCC 95M-28, released February 1, 1995. See also Tr. of conference of October 24, 1995, at pp. 95-98 and related Order FCC 95M-201, released October 26, 1995. Kay's testimony and the testimony of any experts should be heard in Washington, D.C. where all counsel and the case record are located. Counsel and the parties should be able to reach an agreed scheduling of a D.C. phase of the hearings. Cf. 47 C.F.R. §1.253(d).

<sup>8</sup> For organization of documentary evidence, see Presiding Judge's Order FCC 94M-653, released December 22, at fn.3. Trial Briefs shall conform to the format prescribed earlier in Order FCC 95M-106, released April 17, 1995.

October 7-9 - Completion of hearings in Washington,  
D.C.

SO ORDERED.

FEDERAL COMMUNICATIONS COMMISSION<sup>9</sup>

A handwritten signature in dark ink, appearing to read "Richard L. Sippel", written in a cursive style.

Richard L. Sippel  
Administrative Law Judge

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<sup>9</sup> Copies of this Order were e-mailed/faxed to counsel of record on date of issuance.